No. 14,568

United States Court of Appeals
For the Ninth Circuit

JOHN D. SHAW,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Statutes

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JURISDICTIONAL STATEMENT.

Appellant was convicted, after a jury trial in the District Court for the District of Alaska, Third Judicial Division, at Anchorage, Alaska, the Honorable J. L. McCarrey, Jr. presiding, of a violation of Title 18 U.S.C.A. Sec. 284. The Court imposed a fine of One Hundred ($100.00) Dollars. The execution of the sentence has been stayed and from the judgment of conviction he has now appealed. Jurisdiction below was conferred by 48 U.S.C.A. 101. Jurisdiction in this Court is conferred by 28 U.S.C.A. 1291.

STATEMENT OF FACTS.

The Statement of Facts in appellant's brief is substantially correct, however the following dates should be noted.

On November 15, 1951 appellant resigned from the Alaska Railroad. He then held a position as Assistant Chief Dispatcher.

On March 22, 1952 appellant's name was subscribed to the complaint in the case of *Dushon, et al. v. The United States,* a tort claims case in which plaintiffs demanded judgment totalling approximately one and one-half million dollars.

On August 27, 1952 a formal association of attorneys was filed by the counsel for plaintiffs in the *Dushon* case. That association of attorneys was signed by Mr. Butcher, Mr. Grigsby and the appellant.

On September 5, 1952 an amended complaint was filed in the *Dushon* case and appellant's name appeared as one of the attorneys for plaintiffs.

It should be noted that according to the testimony the appellant had access to all the records in the Dispatcher's office. (TR 88 and TR 221.) In addition appellant made a report of the accident in his capacity as Assistant Chief Dispatcher. (TR 84.) The testimony also included evidence that the appellant as Assistant Chief Dispatcher was in a position of authority in the office of the Dispatcher.

ARGUMENT.

I.

THE INFORMATION ADEQUATELY CHARGES THAT THE DEFENDANT WAS AN EMPLOYEE OF AN AGENCY OF THE UNITED STATES.

Appellant challenges the sufficiency of the information on which he was tried and convicted. He now contends that the allegation that the defendant was employed by the Alaska Railroad, without describing the railroad as an agency of the United States, is a fatal defect and that the information does not therefore state an offense against the United States. The wording of the information on this point is as follows:

> "That on March 24, 1950, the said John D. Shaw was employed by the Alaska Railroad, a Government agency, as an Assistant Chief Dispatcher." (TR 1.)

Appellant not only contends that the information itself is defective since it fails to allege that the Alaska Railroad is an agency of the United States (Appellant's Brief 7), but he further contends that the Alaska Railroad is probably not an agency of the United States. (Appellant's Brief 45.) In support of his contentions the appellant has failed to give a citation of authority. The Alaska Railroad was created by Congress. (See 48 U.S.C.A. 301 through 308.) It has specifically been held to be an agency of the United States by this Court. *Berger v. Ohlson et al.,* 120 F.2d 56; *Ballaine v. Alaska Northern Railroad Co.,* 259 F. 183. This is a matter of which the Court will take judicial notice. *Hill v. United States,* 275 F. 187.

Appellant further contends that the information is insufficient in that it does not charge that the appellant acted as counsel, attorney, or agent in prosecuting a claim against the United States involving a subject matter directly connected with which the defendants was employed or performed duties. (Appellant's Brief 78.) The information charges:

> "That on March 24, 1950, the said John D. Shaw was directly connected with and performed duties relating to an accident which occurred at or about 5:15 P.M. on said day when Extra Train No. 562 South, of the Alaska Railroad came into collision with a gas car and trailers attached, operated by a Government contractor, at or near Rainbow at Mile 91.7 on the Alaska Railroad.
>
> That between the dates of March 24, 1950 and March 22, 1952, said period being within two years of the date when the said John D. Shaw left the employ of the Alaska Railroad, the said John Shaw acted as counsel and agent for plaintiffs in the preparation of a suit against the United States on behalf of persons injured in the aforementioned accident.
>
> That from March 22, 1952 until January 20, 1953, said period being within two years of the date when the said John D. Shaw left the employ of the Alaska Railroad, the said John D. Shaw acted as attorney and agent for plaintiffs in the case of George Dushon et al. v. United States, Civil No. A-7605, a suit against the United States brought by the said John D. Shaw and others on behalf of various persons who sustained injuries in the aforementioned accident on March 24, 1950."

The allegations relating to the defendant's performance of duties as Assistant Chief Dispatcher for the railroad at the time of the collision and relating to his acts as counsel and agent, within two years after separation from the railroad's employ, in the preparation and prosecution of a proceedings against the United States on behalf of persons injured in the collision, *necessarily import* the meaning that the defendant prosecuted as counsel and agent a claim against the United States involving subject matter with which he was connected or performed duty as an employee of the United States within two years following a separation from such employment, as prohibited by the statute. Since the necessary portent of the language used substantially charges an offense under Section 284 of Title 18 U.S.C.A., the information is sufficient even though it does not precisely follow the statutory language.

Tatum v. United States, 110 F. 2d 555;

Stumbo v. United States, 90 F. 2d 828, cert. den., 302 U.S. 755;

Capone v. United States, 56 F. 2d 927, cert. den., 286 U.S. 553.

If the essential averments can by a fair construction be found in the text, the information, even though faulty in form, is valid.

Craig v. United States, 81 F. 2d 816, cert. den., 298 U.S. 637.

Since the information adequately apprised the defendant of the nature of the charge he had to meet, it will permit him to plead former jeopardy in the

future, and it sufficiently meets the test as to its validity.

United States v. Josephson, 165 F. 2d 82, cert. den., 333 U.S. 838;

Carter v. United States, 173 F. 2d 684, cert. den., 337 U.S. 946;

Robertson v. United States, 168 F. 2d 294.

The information though faulty in form should be sustained because it adequately charges the defendant with the offense under Title 18 U.S.C.A. 284.

II.

APPELLANT'S CONTENTION THAT TITLE 18 U.S.C.A. 284 DOES NOT EXTEND TO CLAIMS AGAINST THE UNITED STATES SOUNDING IN TORT IS WITHOUT MERIT.

Appellant labors to achieve a statutory interpretation of Sec. 284 Title 18 which will exclude from that section claims against the United States sounding in tort. The statutory language is clear:

> "Whoever, having been employed in any agency of the United States, including Commissioned Officers assigned to duty in such agency, within two years after the time when such employment or service has ceased, prosecutes or acts as counsel, attorney, or agent for prosecuting, *any claims against the United States involving any subject matter directly connected with which such person was so employed or performed duties* * * *" (Emphasis supplied.)

As a general rule Courts will not interpret a statute in an unreasonable manner. Title 18 U.S.C.A. 284

has been judicially construed in the case of the *United States v. Bergson,* 119 Fed. Sup. 459. This decision is from the United States District Court for the District of Columbia and has been cited by the appellant as authority for the proposition that tort claims are not within the statute. The reading of the *Bergson* case does not lead to that conclusion. In *Bergson* the defendant had been prosecuted for violation of Title 18 U.S.C.A. 284 on the following set of facts. The defendant had been in the employ of the Department of Justice. Within two years after leaving Government employment he appeared as counsel in behalf of the Minnesota Mining and Manufacturing Co. and the Carborundum Co. and sought to obtain from the Department of Justice for his clients a clearance letter from the Anti-trust Division of the Department. The second count of the indictment charged that the defendant sought to obtain for the United States Pipeline Co. an Anti-trust clearance letter from the Department of Justice. At the trial the defendant moved for a judgment of acquittal and was successful. The District Judge passed upon the meaning of the terms "claims against the United States" as used in Title 18 U.S.C.A. 284. Judge McLaughlin found that the term "claims against the United States" was intended to cover or embrace claims against the United States Government *for money or for property.*

A reading of the Tort Claims Act, Title 28 U.S.C.A. 1346, indicates that Congress has established the Government's liability for the negligent acts of its employees in plain terms as follows:

> "Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court for the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment. * * *"

The contention urged by appellant would lead to an absurd result. The statute would not in effect, if appellant is correct, mean what it plainly states.

There can be little doubt that the action brought again the United States in the *Dushon* case, by those injured in the railroad collision at Rainbow were claims for money within the purview of Title 18 U.S.C.A. 284.

The appellant's argument that a ruling finding a tort claim within the scope of Section 284 of Title 18 would operate to make it an offense for former Government employees to prosecute tort claims in their own behalf for injury sustained in the course of their employment is frivolous. The statutory prohibition is agains the prosecution of claims by a former employee "as counsel, attorney or agent for another", and not against the prosecution of a claim in his own behalf.

III.

APPELLANT'S CONTENTION THAT THE UNITED STATES FAILED TO PROVE THAT THE DEFENDANT ACTED AS ATTORNEY IN THE PROSECUTION OF A CLAIM AGAINST THE UNITED STATES INVOLVING SUBJECT MATTER CONNECTED WITH WHICH HE WAS EMPLOYED OR PERFORMED DUTY IS UNSOUND.

Appellant suggests that Section 284 of Title 18 U.S.C.A. is not applicable to him because it prohibits former Government employees from post-employment prosecutions of claims against the United States only when the employees had previously been connected with the claim which was pending at the time of his employment. The statute contains no such limitation. It clearly prohibits the prosecution of claims by a former employee who has acted as attorney, counsel or agent "involving any subject matter directly connected with which such person was so employed or performed duty". In plain meaning the statute simply condemns one from acting as counsel, agent or attorney in any subject matter with which the employee performed duties. It is clear that the appellant had been connected at the time of his employment as a train dispatcher with the "subject matter" which gave rise to the claim which he later prosecuted as attorney. (TR 154, 155.)

IV.

APPELLANT'S CONTENTION THAT HE WAS NOT IN POSSESSION OF INFORMATION WHICH WAS CONFIDENTIAL OR WHICH MIGHT BE USED DETRIMENTALLY AGAINST THE UNITED STATES IS WITHOUT MERIT.

This is of course an effort by the appellant to again limit the application of Section 284 of Title 18 U.S. C.A. The statute contains no such limitation and if such limitation was construed to be in the statute it would lead to a rather absurd result. The purpose of the statute is clearly set out. Appellant alleges that he had no information, confidential or otherwise, that was not known to every person that read the newspapers or listened to the radio. (Appellant's Brief 19.) The fallacy of this reasoning is of course apparent since the United States could hardly be in a position to show whether or not appellant had information which was confidential or otherwise. Nor is this an element which the United States is required to prove under Section 284 Title 18 U.S.C.A. It would be unreasonable to require the United States in addition to the other requirements set forth in Section 284 to prove that the appellant had confidential information which might aid in the assistance of preparation of a claim against the United States. The contention that the United States in prosecution of this case failed to show that the defendant had access to information regarding the collision or that he furnished information to anyone regarding the collision is not valid. The records of the Alaska Railroad were certainly not readily available to the public. The statute says nothing about confidential information or that

the party in performing his duty must have access to certain classified and confidential information which would be of assistance to a claimant against the United States.

V.

THE COURT'S INSTRUCTIONS TO THE JURY WERE ADEQUATE.

Appellant's objection to the sufficiency of the instructions to the jury is without substance. The instructions should be taken as a whole and adequately cover the law of the case. The giving of additional instructions as requested by the appellant was within the discretion of the trial Court. *Allis v. U. S.,* 155 U.S. 117; *Allen v. U. S.,* 186 F. 2d 439; *Wilton v. U. S.,* 156 F. 2d 433.

VI.

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN CONVICTION.

In considering the sufficiency of the evidence in reviewing the denials of appellant's motions for acquittal as well as the verdict and judgment of conviction, the Government is entitled to have the evidence and inferences reasonably to be drawn therefrom viewed in the light most favorable to the Government. *U. S. v. Horton,* 180 F. 2d 427 (7th Cir. 1950); *Ross v. U. S.,* 197 F. 2d 660 (6th Cir. 1952); *U. S. v. Schneiderman,* 106 F. Supp. 906; *U. S. v. Stoehr,* 100 F. Supp. 143, aff'd 196 F. 2d 276, 33 A.L.R. 2d 836, cert. den., 344 U.S. 826; *U. S. v. Thayer,* 209 F. 2d 534 (7th Cir. 1954); *Thomas v. U. S.,* 211 F. 2d 45, cert.

den., 347 U.S. 969 (D.C. Cir. 1954); *Las Vegas Merchant Plumbers' Ass'n v. U. S.*, 210 F. 2d 732 (9th Cir. 1954), cert. den., 348 U.S. 817; *U. S. v. O'Brien*, 174 F. 2d 341 (7th Cir. 1949).

Without going into any detailed discussion of the evidence in the record, appellee respectfully submits that there is sufficient competent evidence to support both the verdict below and the trial Court's denials of the appellant's motions for acquittal.

CONCLUSION.

The trial Court did not commit error in denying appellant's motions for acquittal since there is sufficient evidence in the record to support each and every material allegation of the information. The information on which defendant was charged and convicted is sufficient to charge an offense under Title 18 U.S.C.A. 284. The appellant has failed to prove reversible error in the Court's instructions to the jury. The verdict of the jury is in accordance with the weight of the evidence and therefore should be sustained.

Dated, Anchorage, Alaska,
July 27, 1956.

Respectfully submitted,

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